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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LOS ANGELES UNIFIED SCHOOL DISTRICT, Plaintiff and Appellant, v. COMMISSION ON PROFESSIONAL COMPETENCE, Defendant and Respondent; GLORIA HSI, Real Party in Interest.	B204963 (Los Angeles County Super. Ct. No. BS106517)

APPEAL from a judgment and order of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Liebert Cassidy Whitmore, Mary L. Dowell and Jennifer R. Hong, for Plaintiff and Appellant.

Trygstad, Schwab & Trygstad, Lawrence B. Trygstad, Shanon D. Trygstad and Richard J. Schwab, for Real Party in Interest.

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Los Angeles Unified School District (LAUSD) appeals from the trial court's judgment denying its petition for writ of administrative mandamus. LAUSD filed the petition after the Commission on Professional Competence (CPC) determined that LAUSD did not have cause to terminate real party in interest Gloria Hsi from her employment as a teacher. On appeal, LAUSD contends there was insufficient evidence to support the judgment. In light of LAUSD's failure to set forth all the material evidence on this point, we find that LAUSD has waived this contention and we affirm the judgment. Hsi also appeals from the attorney fees order reducing the amount of her claimed fees. We find no abuse of discretion and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Hsi, who is in her seventies, began teaching general education students for LAUSD in 1977. In 1981 she earned a clear bilingual certificate of competence in Spanish. From 1983 to 1989 she left LAUSD and taught in the Oakland area. She returned to LAUSD and taught at Miller Elementary School. In 1989 she received a Master's degree in Education and in 1990 a clear specialist instruction credential in special education, with a learning handicapped authorization. In 1998 she transferred to Hoover Elementary School (Hoover), where she became a learning handicapped special day classroom teacher in the 2002/2003 school year.

Hsi's special day class consisted of 10 or 11 special education students in grades first through third, whose primary language was Spanish. The students included those with learning disabilities, autism and Down syndrome, and each student had special needs and goals described in an individualized education program. The students entered her class performing two or more grade levels below their actual grade level. Some of the students in Hsi's class were violent and had to be removed from the class. One particularly violent student continued to exhibit violence when placed in another class. Another student required a one-on-one aide, but no aide was provided for at least six weeks. There were also times when the teaching aide was late and Hsi was the only adult in the classroom.

Administrators at Hoover frequently observed the different special education classes, including Hsi's class. Based on their observations, Hsi was issued notices of unsatisfactory acts on February 21, 2003, April 10, 2003, April 14, 2004 and October 25, 2004, and below standard evaluations on May 30, 2002, May 25, 2003 and June 1, 2004.

In March 2005, the Board of Education issued a written "Accusation and Statement of Charges," asserting that cause existed to terminate Hsi's employment on four grounds: unprofessional conduct; unsatisfactory performance; evident unfitness for service; and persistent violation of school laws and regulations (Ed. Code, § 44932, subds. (a)(1), (a)(4), (a)(5) & (a)(7)). The accusation specified 41 separate charges, including incidents in which Hsi was observed to be teaching ineffectively or failing to control her students. After receiving notice of the board's intent to terminate her employment, Hsi requested a hearing on the charges made against her.

A 21-day hearing was conducted by the CPC.[1] Hsi testified for approximately eight days and three parents testified on her behalf. Numerous documents were admitted into evidence. After taking the matter under submission, the CPC issued a 15-page decision unanimously concluding that no cause existed to terminate Hsi's employment. The decision set forth the CPC's general findings that the LAUSD's administrators who testified "were not persuasive" because there was no evidence that they had training or expertise in special education, and the CPC "simply disagreed with many of their conclusions about what they had observed of [Hsi's] teaching skills or style." The CPC found that Hsi's students were difficult to teach and manage and that many of the observed behaviors of Hsi's students "were simply characteristics of special education

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[1] The CPC is a legislatively mandated body consisting of three panel members: "One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be an administrative law judge of the Office of Administrative Hearings . . . ." (Ed. Code, § 44944, subd. (b)(1).) The members selected by the employee and the governing board "shall not be related to the employee and shall not be employees of the district initiating the dismissal or suspension and shall hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee." (Ed. Code, § 44944, subd. (b)(2).)

students and not the result of improper supervision or a failure to motivate them." The decision then set forth each of the 41 charges and detailed the CPC's findings as to why none of the charges was established.

LAUSD filed a petition for writ of administrative mandamus, which the trial court denied. In a minute order, the court stated that it found LAUSD did not meet its burden of overcoming the presumption that the CPC's decision was correct. Hsi then filed a motion for attorney fees in the amount of $300,670. LAUSD opposed the motion and filed a notice of appeal from the judgment. LAUSD then applied ex parte for a stay of the motion pending the appeal. The trial court denied the ex parte application and granted the attorney fees motion, but reduced the amount of fees to $180,000 after adjusting "both the hourly rates and the number of hours charged to levels that it consider[ed] reasonable under the circumstances." LAUSD then filed a notice of appeal from the order granting attorney fees and Hsi filed a notice of cross-appeal from the attorney fees order.

DISCUSSION

I. Appeal From the Judgment.

A. Standard of Review

"The decision of a Commission on Professional Competence may be challenged in superior court by means of a petition for a writ of mandate. (See [Ed. Code,] § 44945; Gov. Code, § 11523; Code Civ. Proc., § 1094.5.) In reviewing a commission's decision, the superior court 'shall exercise its independent judgment on the evidence.' (§ 44945.)" (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 313–314.) While a trial court must afford a strong presumption of correctness in the administrative findings (*Fukuda v. City of Angeles* (1999) 20 Cal.4th 805, 817), the trial court is "not bound by the findings of the Commission in exercising its independent judgment review" (*Pittsburg Unified School Dist. v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 977). The trial court is "free to

make its own determination of the credibility of witnesses in the process [citation]." (*Ibid.; Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658.)

Where a trial court is required to make such an independent judgment upon the record of an administrative proceeding, the scope of our review on appeal is limited. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence*, *supra*, 20 Cal.3d at p. 314.) "An appellate court must sustain the superior court's findings if substantial evidence supports them. [Citations.] In reviewing the evidence, an appellate court must resolve all conflicts in favor of the party prevailing in the superior court and must give that party the benefit of every reasonable inference in support of the judgment. When more than one inference can be reasonably deduced from the facts, the appellate court cannot substitute its deductions for those of the superior court. [Citation.]" (*Ibid*.)

B. Trial Court's Exercise of Independent Judgment

Before turning to the issue of whether substantial evidence supports the judgment, we first address LAUSD's initial argument that the trial court's ruling should be overturned because the trial court failed to exercise its independent judgment. (See *Barber v. Long Beach Civil Service Com.*, *supra*, 45 Cal.App.4th at p. 660 ["It follows that where the trial court has failed to perform its duty, we are unable to perform ours, and the matter must be remanded for a new trial"].) LAUSD asserts two bases for its claim that the trial court failed to exercise its independent judgment. First, LAUSD points out that the trial court gave no indication that it had examined the credibility of witnesses. From this, LAUSD leaps to the conclusion that the trial court must have failed to exercise its own independent judgment. This assertion is without merit. LAUSD cites no authority mandating the trial court to specify that it has weighed the credibility of witnesses. Moreover, the minute order issued by the trial court following the hearing on the petition for writ of mandate specifically states that the trial court made an "independent examination of the administrative record." Finally, where, as here, there was no request that the trial court issue a statement of decision, "all intendments favor the ruling below; and we must infer every finding of fact supporting the judgment so long as

it is warranted by the evidence. [Citations.]" (*Veguez v. Governing Bd. of the Long Beach Unified School Dist.* (2005) 127 Cal.App.4th 406, 421.)

LAUSD also argues that the trial court's failure to exercise its independent judgment is evident from comments made by the trial court at the hearing on the petition for writ of mandate. LAUSD focuses on the court's comment that there was no evidence that LAUSD did not need teachers to teach regular education classes, as opposed to special education classes, "and that's the basis of why I decided the case." But LAUSD ignores the court's other comments that it was not ordering LAUSD to move Hsi into a regular education class, and that the court was deciding whether the CPC "was clearly wrong" in finding no cause to terminate Hsi. While the court repeated in its minute order that the "weight of the evidence set forth in the administrative record does not show that Hsi, a teacher with thirty years of experience, could not competently teach and control a class of regular education students," the minute order also stated that the court had made an independent examination of the administrative record. Thus, even if the court did improperly take into account whether Hsi might be able to teach regular students, we cannot conclude from the record before us that the court failed to perform its duty of exercising its independent judgment.

C. Substantial Evidence

LAUSD next argues that "the weight of the evidence" supports each of the 41 charges against Hsi and each of the four causes for dismissal. But LAUSD misapprehends our standard of review. Our role on appeal is not to determine whether there was sufficient evidence supporting LAUSD's case; rather, our role is to determine whether substantial evidence supports the trial court's decision. As such, LAUSD's burden on appeal is not to demonstrate the existence of evidence that supports its case, but "'to demonstrate that there is *no* substantial evidence to support the challenged findings.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. It is the appellant's burden to identify and establish deficiencies in the

evidence. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.) This burden is a "'daunting'" one. (*Ibid*.) "'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*. [Citation.]' [Citation.] '[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.'" (*Ibid*.) Thus, appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it """are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed waived." [Citations.]'" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96–97 [same]; *Huong Que, Inc. v. Luu, supra*, at pp. 409–410 ["An appellate court will consider the sufficiency of the evidence to support a given finding only after a party tenders such an issue together with a fair summary of the evidence bearing on the challenged finding, particularly including evidence that arguably *supports* it"].)

LAUSD clearly failed to meet its burden on appeal. Rather than setting forth all the material evidence presented by the parties, LAUSD set forth only its own evidence, leaving it up to Hsi to set forth her evidence. Even a cursory review of the record shows there was substantial evidence to support the trial court's ruling. Because LAUSD failed to fulfill its obligation of setting forth all the material evidence, it also failed to fulfill its obligation of demonstrating the insufficiency of the evidence. Accordingly, we find that LAUSD has waived its claim of insufficiency of the evidence.

II. Cross-Appeal From the Attorney Fees Order.

Hsi appeals from the trial court's order awarding her partial attorney fees. She contends that the trial court abused its discretion in reducing the amount of attorney fees

and requests that the full amount of her claimed fees be awarded or that the matter be remanded for the trial court to provide a clear explanation of its reasoning.

We review an order granting or denying attorney fees for an abuse of discretion. (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148.) A trial court has broad discretion to determine the amount of reasonable fees to be awarded. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) Thus, we do not generally reverse unless the record establishes there is "no reasonable basis" for the trial court's action. (*Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 965.)

Hsi brought her motion for attorney fees pursuant to Education Code section 44944, subdivision (e)(2), which provides that if the CPC determines that the employee should not be dismissed or suspended, the governing board shall pay "reasonable attorney's fees incurred by the employee." The determination of what constitutes a reasonable fee generally "begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate." (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.) The lodestar is the basic fee for comparable legal services in the community and may be adjusted by the court based on factors specific to the case, including the novelty and difficulty of the questions involved, the skill displayed in presenting them, and the fact that an award against the state would ultimately fall upon the taxpayers. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132; *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action." (*Ketchum v. Moses, supra,* at p. 1132.)

In support of her motion for attorney fees in the amount of $300,670, Hsi submitted a declaration from one of her attorneys, which stated that his firm had represented Hsi in this case for more than two years and had engaged in significant discovery and pretrial work prior to representing her in the 21-day hearing. The declaration set forth the billing rates of each of the attorneys who worked on Hsi's case, the number of hours they worked and the length of time they had been practicing education law. Attached to the declaration was a billing statement, though there was no

authentication for the statement. LAUSD opposed the motion on the grounds that the matter should be stayed pending the appeal; the billing statement contained block billing, which made it impossible to determine whether time spent on a particular activity was reasonable; the billing statement contained entries showing duplicative or excess time spent on a single task; and the billing statement was vague such that it was impossible to determine how the attorneys' actions were related to the case. LAUSD set forth examples of each of these grounds. LAUSD also applied ex parte for a stay of the matter pending the appeal.

The trial court denied the ex parte application. In a minute order following the hearing on the motion for attorney fees, the trial court stated that it found LAUSD's contentions to be without merit. The court also stated: "The billing records produced by Hsi in support of her motion for attorney's fees are in reasonable detail and provide respondent with the information necessary to oppose the motion. The court has adjusted both the hourly rates and the number of hours charged to levels that it considers reasonable under the circumstances." When Hsi's attorney inquired of the court at the hearing as to which hours and rates had been reduced, the court declined to elaborate.

On appeal, Hsi argues that the trial court abused its discretion by failing to identify which hours and rates it had reduced. She claims this failure has deprived us of meaningful review. But a statement of decision is not required on a fee motion, nor is one required on a motion generally. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294.) Thus, the trial court was not required to set forth its findings on the fee motion.

Moreover, the record does not demonstrate that the trial court had "no reasonable basis" for its fee reduction. The court was clearly aware of the appropriate method to be used in calculating the fees, i.e., the lodestar, as reflected by its statement that it was reducing the number of hours and rates charged. The court also stated in its minute order that it was reducing the hours and rates to levels it found to be reasonable "under the circumstances." "'Because the "experienced trial judge is the best judge of the value of professional services rendered in his court," we will not disturb the trial court's decision unless convinced that it is clearly wrong, meaning that it is an abuse of discretion.'"

(*Graciano v. Robinson Ford Sales, Inc., supra,* 144 Cal.App.4th at p. 148.) We note that Hsi's motion for fees presented no evidence that the rates charged by her counsel were the generally prevailing community rates for this kind of work. (See *PLCM Group, Inc. v. Drexler*, *supra,* 22 Cal.4th at p. 1095 ["The reasonable hourly rate is that prevailing in the community for similar work"].) We are not convinced that the trial court abused its discretion in reducing the fee award.

We also reject LAUSD's contention that the trial court should have stayed the matter pending the outcome of this appeal. Although LAUSD filed a notice of appeal from the fee order, it makes no challenge to this order until its reply brief on appeal. Points not raised until a reply brief are generally considered waived. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. 10.) In any event, LAUSD cites no authority for its contention and we therefore give it no consideration.

DISPOSITION

The judgment and order awarding attorney fees are affirmed. The parties to bear their own costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST